

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM) Case No.. CCH-MA13-01
INSTREAM FLOW STANDARDS FOR)
HONOPOU, HUELO (PUOLUA),)
HANEHOI, WAIKAMOI, ALO,)
WAHINEPEE, PUOHOKAMOA,)
HAIPUAENA, PUNALAU/KOLEA,)
HONOMANU, NUAAILUA, PIINAAU,)
PALAUHULU, OHIA (WAIANU),)
WAIOKAMILO, KUALANI, WAILUANUI,)
WEST WAILUAIKI, EAST WAILUAIKI,)
KOPILIULA, PUAKAA, WAIOHUE,)
PAAKEA, WAIAAKA, KAPAULA,)
HANAWI, AND MAKAPIPI STREAMS)
_____)

Minute Order No. 21

Schedule for the Re-opened Hearing

The following schedule was established at the Thursday, September 1, 2016 prehearing conference:

1. Pursuant to H.A.R. Section 13-167-51, the contested case hearing on the above entitled matter is scheduled for January 9-13, 2017 on Maui at a time and place to be determined. More days may be scheduled as warranted.
2. All parties shall file and serve their documents to the Hearings Officer, the Deputy Attorney for the Commission, and all other parties according to the following schedule:

Close of Business (COB) Monday, October 17, 2016: All parties to file and serve their opening statements, opening briefs, witness lists, and witness statements and exhibits.

COB Monday, December 5, 2016: All parties to file and serve their responsive briefs, witness lists, and witness statements and exhibits.

COB Monday, December 19, 2016: All parties to file and serve their rebuttal briefs, witness lists, and witness statements and exhibits.

Monday, January 9, 2017: Opening day of the contested case hearing.

A prehearing conference will be held sometime between December 19, 2016, and January 9, 2017, to establish the order of witnesses and other matters pertaining to the conduct of the contested case hearing.

Certificates of service and other matters pertaining to documents and other materials that have applied to the contested case hearing to date shall continue to be applicable to this rehearing. (See items 3-8 of Minute Order No. 4, dated April 21, 2014.)

In its August 18, 2016 order on the scope of the re-opened hearings, the Commission concurred with the Hearings Officer's recommendation regarding the scope of the re-opened contested case hearing. Minute Order No. 19 (April 1, 2016) identified the following areas:

1. HC&S/A&B's current and future use of surface waters and the impact on the groundwater sources for its central Maui fields of HC&S's cessation of sugar operations;
2. The impact of HC&S's cessation of sugar operations on MDWS's use of surface water;
3. Maui County's position on the future use of the central Maui fields; and
4. How EMI is managing the decrease in diversions, how it would manage the interim restorations, and any issues concerning the (structural) integrity of the EMI ditch system with the current and any future changes in offstream diversions.

At the prehearing conference, the Hearings Officer also stated that he would be requesting evidence on two other areas:

5. A staff presentation on: a) estimates of diverted and undiverted stream flows, to estimate how much water had been diverted from each stream, and how much was being restored under the 2008, 2010, and 2016 Commission orders; and b) any updates of stream life after the restorations, and H₉₀ flows near the terminus for each of the streams; and
6. Testimony from a representative of MTF on its March 8, 2016 "Malama `Āina: A Conversation About Maui's Farming Future."

At the prehearing conference, motions by Nā Moku and MTF were discussed.

Nā Moku's motion to expand the scope to include new information regarding stream flows gathered after releases in April or May, 2016, is addressed by the planned staff presentation.

MTF's motion interprets several comments in the Commission's order of August 18, 2016 as possibly binding on the Hearings Officer in the re-opened hearing, and seeks reconsideration that these are not findings of fact that are binding on the Hearings Officer:

- a. That there would be a decreased need of from 21.04 mgd to 67.84 mgd in a transition from sugar cane to a diversified agriculture model;
- b. That MDWS had an anticipated future need of 9.15 mgd; and
- c. That the Commission's comments on EMI's continued operation of the ditch system to continue diversified agriculture in the central Maui fields is an argument that A&B/HC&S is more entitled to the surface waters than other potential users (including stream restoration).

Discussions during the prehearing conference did not dissuade MTF from seeking a reconsideration from the Commission, and MTF further commented that the Hearings Officer did not have the authority to respond to its motion. The Hearings Officer agrees with the latter statement and will leave the resolution to MTF, the Commission, and its Deputy Attorney General.

However, the Hearings Officer makes the following observations:

First, the decreased need of 21.04 mgd to 67.84 mgd for diversified agriculture, the anticipated future need of 9.15 mgd for MDWS, and EMI's continued operation of the ditch system to continue diversified agriculture, were all claims made by the County, not the Commission, which the Commission summarized in a paragraph which began "(t)he County's motion stated that..."

Second, the rehearing will specifically address the changed requirements for surface waters on HC&S's former sugar cane fields, and the information on what those requirements would be are yet to be introduced into evidence and evaluated by the Hearings Officer and the Commission.

Third, the record is clear that out of MDWS's current "production capacity" of 17.9 mgd, 9.1 mgd is the "reliable capacity," because of maintenance requirements and limitations on the use of its surface and ground water sources. Usage varied between 6 mgd and 10 mgd, averaging

7.9 mgd, between 2004 and 2013. MDWS's anticipated additional need to 2030 is 4.2 mgd to 7.95 mgd.

Fourth, the re-hearing will address any issues concerning the (structural) integrity of the EMI ditch system with the current and any future changes in offstream diversions. Amendments to the IIFS require the Commission to balance instream versus offstream uses, including the economic impact on offstream uses. An inquiry into the present and future state of the EMI ditch system is integral to that balancing and in no way is an argument that A&B/HC&S is entitled to more water than other potential users.

Fifth and finally, MTF states that HC&S has the burden to prove the need for water for its now unused sugar cane fields. MTF is incorrect. HC&S would have that burden when seeking water-use permits, as it is currently in the Nā Wai `Ehā CCH. The burden is on the Commission to weigh competing instream and offstream uses in amending the IIFS, and its findings in the IIFS setting are not binding on the parties in any subsequent water-use permit application or appurtenant rights proceedings, where the burden is on the applicant.

DATED: Honolulu, Hawaii, September 8, 2016.



LAWRENCE H. MIIKE
Hearings Officer

COMMISSION ON WATER RESOURCE MANAGEMENT

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INSTREAM FLOW STANDARDS FOR)
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_____)

CERTIFICATE OF SERVICE

On September 8, 2016, a copy of the foregoing document was served on:

ALAN T. MURAKAMI, ESQ.
CAMILLE K. KALAMA, ESQ.
SUMMER L. SYLVA, ESQ.
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawaii 96813
Attorneys for Nā Moku Aupuni O Ko'olau
Hui

DAVID SCHULMEISTER, ESQ.
ELIJAH YIP, ESQ.
Cades Schutte LLP
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813
Attorneys for Alexander & Baldwin, Inc.
and East Maui Irrigation Company, Ltd.

PATRICK WONG, ESQ.
CALEB ROWE, ESQ.
KRISTIN TARNSTROM, ESQ.
Dept. of the Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawai'i 96793
Attorneys for County of Maui, Department
of Water Supply

ROBERT H. THOMAS, ESQ.
Damon Key Leong Kupchak Hastert
1600 Pauahi Tower
1003 Bishop Street
Honolulu, Hawai'i 96813
Attorney for Hawai'i Farm Bureau
Federation

ISAAC HALL, ESQ.
2087 Wells Street
Wailuku, Hawai'i 96793
Attorney for Maui Tomorrow

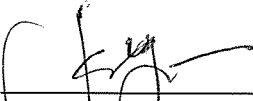
JEFFREY C. PAISNER
403 West 49th Street, #2
New York, New York 10019
Pro Se

WILLIAM J. WYNHOFF, ESQ.
LINDA L.W. CHOW, ESQ.
Department of the Attorney General
465 South King Street, Room 300
Honolulu, Hawaii 96813
Attorneys for the Tribunal

Copies, as necessary:

JOHN BLUMER-BUELL
P.O. Box 787
Hana, Hawaii 96713
Witness

NIKHILANANDA
P.O. Box 1704
Makawao, Hawaii 96768-1704
Witness



KATHY YODA
Commission on Water Resource Management